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No. 08-824

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

JAMES E. PIETRANGELO, II,

Petitioner,

v.

ROBERT M. GATES, Secretary of Defense; MICHAEL CHERTOFF, Secretary of Homeland Security; UNITED STATES,

Respondents.

MOTION TO STRIKE *BRIEF FOR THE COOK RESPONDENTS*; MOTION TO SEAL ATTACHMENT A TO THIS MOTION

Pursuant to Rule 21 of the Rules of the Supreme Court of the United States, Petitioner James E. Pietrangelo, II ("Petitioner") moves this Court to strike the *Brief for the Cook Respondents* filed on January 26, 2009, on the grounds that that *Brief* is improper and prejudicial to Petitioner.

I. The *Brief* Violates The Duties of Loyalty and Confidentiality to Petitioner

Petitioner has petitioned for certiorari in a case that began in the District of Massachusetts as Cook v. Rumsfeld, No. 04-12546-GAO. Petitioner was represented in that case at the District Court level jointly by law firm WilmerHale and legal organization Servicemembers Legal Defense Network (SLDN); during that representation, Petitioner disclosed confidential factual information to WilmerHale and SLDN and discussed confidential legal strategy with them as well. The *Brief for Cook Respondents* plainly opposes certiorari for Petitioner. See, *e.g.*, *Brief for Cook Respondents* at 2 ("Unlike petitioner, however, the Cook respondents believe the Court would be better advised to

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defer review at this time."), 11 ("it would be appropriate for the Court to postpone review..."), 14 ("Cook respondents suggest that immediate review of the sensitive substantive and procedural issues raised by this case would be premature."). The *Brief* was jointly written and filed by WilmerHale and SLDN, on behalf of the eleven individuals who were also plaintiffs—beside Petitioner—in Cook v. Rumsfeld, No. 04-12546-GAO, but who chose not to seek certiorari. Petitioner did not consent to the *Brief* nor to WilmerHale/SLDN's opposition to certiorari for Petitioner; and no imputation exceptions apply. Thus, the *Brief* violated/violates WilmerHale and SLDN's ethical duties of loyalty and confidentiality to Petitioner, see attachment A, and cannot be allowed to stand in the record. Since attachment A is or may be confidential under the circumstances described in the attachment, Petitioner moves for the attachment to be sealed until the circumstances allow its publication.

II. The *Brief* Is An Impermissible End-Run Around the Rules

All twelve plaintiffs in Case No. 04-12546-GAO had until January 5, 2009, in which to file a petition for certiorari to review the adverse decision of the First Circuit. The eleven other plaintiffs besides Petitioner—hereafter denominated as "the Cook plaintiffs"—apparently did not want anyone including Petitioner filing for certiorari, fearing—according to what their attorney, Stuart Delery of WilmerHale, told Petitioner in December 2008—that the current Court might not only rule in favor of Don't Ask, Don't Tell but might roll-back Lawrence v. Texas too. So, the Cook plaintiffs did not file—hoping or believing that Petitioner would not either. Stuart Delery left WilmerHale and went to work for the Department of Justice. However, Petitioner—who *never* directly or indirectly stated or suggested to anyone that he would not file, and who had represented

himself at the Circuit level—filed *pro se* for certiorari on December 23, 2008. With the holidays and with Mr. Delery gone, January 5, 2009 quickly came and went without the Cook plaintiffs filing for certiorari. With Petitioner's petition having mooted the Cook plaintiffs' reason for refraining from filing in the first place, the Cook plaintiffs—and/or their counsel—obviously now wanted back in the game. They wanted to benefit from any favorable ruling from the Court for Petitioner, should the Court take the case. But they had missed the deadline for a petition. So they filed a *respondents'* brief under Rule 12.6, arguing *for* Petitioner's claims of error—so that if the case were taken by the Court they could press their same claims or benefit in their same claims—but arguing *against* certiorari—so that their arguments *for* Petitioner's claims of error would not be considered a petition for certiorari and thus barred by the deadline.

Such an approach is an end-run around the Rules and is unfair to everyone whose petition has been barred by an otherwise absolute application against after-the-deadline extensions. The Cook plaintiffs had several months—including an extension from Justice Souter—to file a petition arguing for the same or virtually the same claims of error presented by Petitioner, but they chose not to. They should not be allowed to now submit those claims *sub rosa*, almost a month after the deadline. The purpose of a Rule 12.6 respondent's brief is not to allow a second bite at the apple for a losing appellee or appellant from below who misses the deadline or strategically wrongly choses not to file a petition, but to allow a party who has an interest *divergent* to a petitioner's (losing appellee or appellant's) *claims* but who was not immediately involved in the case below—so as to be traditionally named a respondent—to present their arguments. The Cook plaintiffs are not such a party.

III. The *Brief* Is Frivolous

To accomplish the gymnastics of their dual action—supporting Petitioner's claims but opposing Petitioner's certiorari—WilmerHale and SLDN and the Cook plaintiffs simply turn this Court's jurisprudence on its head. WilmerHale and SLDN and the Cook plaintiffs say that Petitioner's and all Gay servicemembers' constitutional rights were/are indeed violated by Don't Ask, Don't Tell, and thus that the lower courts erred in not finding for Petitioner, see *Brief for Cook Respondents* at 2, 9, but nonetheless that Petitioner's only remedy is both to wait and see if a plaintiff (Major Witt) in an unrelated case (Witt v. Dep't of the Air Force) succeeds at the district court level on her challenge to Don't Ask, Don't Tell and to wait and see if President Obama and/or Congress neutralizes/repeals Don't Ask, Don't Tell sometime in the next four to eight years, see *id.* at 10-14. In other words, according to WilmerHale and SLDN and the Cook plaintiffs, *Petitioner*'s case is unripe, and therefore certiorari should be denied. See *id.* at 2, 11, 14. However, this Court's doctrine of ripeness is completely opposite to what WilmerHale, SLDN, and the Cook plaintiffs suggest. Ripeness means an actual constitutional injury must have already occurred, rather than being hypothetical or possible. Petitioner was already involuntarily discharged under Don't Ask, Don't Tell in 2004. Moreover, millions of otherwise qualified and willing Americans have already been denied an opportunity to join the Military over the last fifteen years under Don't Ask, Don't Tell. Furthermore, the free speech of thousands of service members, including Petitioner, has already been suppressed over the last fifteen years under Don't Ask, Don't Tell. Additionally, thousands of service members, including Petitioner, have already been abused—separate from mere discharge—over the last fifteen years under Don't Ask,

Don't Tell. Indeed, far from being unripe, this case is positively rotten—stinking full of festering constitutional wrongs. It is more than ready for adjudication of Petitioner's claims.

Moreover, the doctrine of ripeness means remedy for a plaintiff is merely delayed, not completely denied. WilmerHale, SLDN, and the Cook plaintiffs speak as if Petitioner were involved in the ongoing Witt case, and that he will be able to come before the Supreme Court should the lower courts decide Witt in the government's favor, or that he will benefit if the lower courts decide Witt against the government. Petitioner is not involved in Witt, and if this Court denies certiorari to Petitioner, Petitioner's case is over. Dead. Petitioner will have lost completely. Even a government loss in Witt would not change that, because Witt would—assuming the government did not appeal to this Court—be limited to its facts and to the specific jurisdiction. Never in the history of this Court has this Court ever said that a petitioner before the Court with a ready constitutional claim in hand can be forced to involuntarily sacrifice it for another plaintiff in an unrelated case whose claim is even less fully developed. The doctrine suggested by WilmerHale, SLDN, and the Cook plaintiffs would eviscerate the American concept of individual liberty and access to courts. Under that doctrine, only "popular" or "authorized" plaintiffs would get justice—with different factions determining who is authorized to sue. Petitioner's case is not unripe simply because WilmerHale, SLDN, and the Cook plaintiffs don't like its chances.

Equally absurd is WilmerHale, SLDN, and the Cook plaintiffs' argument that "Congress and the President will be initiating their own reexaminations of the DADT statute in the relatively near future, and raise the possibility of legislative action that

might eliminate any need for this Court to address the constitutionality of the present statute." See *Brief for Cook Respondents* at 14. Putting aside its obviously purely speculative nature (*i.e.*, it is possible that either the reexamination or the legislation action would never take place), that argument reduces this Court to a complete farce. It makes the Court a sort of third-string protector of the Constitution, or worse, a mere figurehead. That argument says that if the executive and/or legislative branches create a continuing violation of the Constitution, the judicial branch cannot act until the other two branches have had a chance—as determined and defined by them—to fix the problem. Under that argument, the constitutional violations of Don't Ask, Don't Tell could go on for years without review and there would be no problem—an obvious absurdity. Under that argument, the fox guards the constitutional henhouse.

Moreover, even if Don't Ask, Don't Tell were repealed today, that obviously would not eliminate the need for this Court's review of Petitioner's claims, as WilmerHale and SLDN and the Cook plaintiffs suggest. Petitioner and the many others harmed by Don't Ask, Don't Tell would still obviously be entitled to vindication. This is especially true with respect to continuing denial of benefits and other actual harms caused by their discharges under Don't Ask, Don't Tell.

Finally, WilmerHale, SLDN, and the Cook plaintiffs' argument that Petitioner's case is unripe because it lacks a factual record and a factual record will be developed in Witt is obviously wrong. There is no factual record in Petitioner's case because the district court in Petitioner's case refused to allow a factual record. The proper and prudential remedy for that denial is for this Court to grant certiorari to Petitioner and to reverse the lower courts in Petitioner's case, as Petitioner has argued this Court should

do. A factual record in Witt obviously could not even begin to provide answers for this Court in Petitioner's case, because 1) the claims are not identical, and 2) the factual assertions are not identical. For example, Petitioner claims that service members, in particular Gay service members, are systematically abused (beyond just being discharged) in the Military. For another example, Petitioner claims that the free speech of service members, in particular Gay service members, is chilled in the Military. Major Witt makes no such claims in her case. More importantly, a factual record is not necessary as to Petitioner's *facial* claims. Petitioner's argument is that you do not need a factual record regarding unit cohesion to know that homosexual orientation is inherently no more harmful to the Military than heterosexual orientation, just like Blacks are no more likely to inherently commit crimes than Whites are.

III. Conclusion

Never in the history of the Supreme Court—to Petitioner's knowledge—has a respondent supported the claims of a petitioner but opposed certiorari. It is unheard of. The truth is that WilmerHale and SLDN and the Cook plaintiffs do not oppose certiorari, but instead oppose certiorari *before this particular Court*. They fear that the current set of Justices may not only uphold Don't Ask, Don't Tell, but roll-back recent Gay victories such as Lawrence v. Texas as well, and consequently they would rather put their hopes in a case like Witt where they supposedly have a greater hope of success. But Petitioner believes that, to quote a former President, there is nothing to fear but fear itself.

For the foregoing reasons, the *Brief for Cook Respondents* should be stricken.

February 2, 2009.

Respectfully submitted,

James E. Pietrangelo II

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CERTIFICATE OF SERVICE

I declare under penalty of perjury under the laws of the United States of America that I served three copies of the foregoing Motion upon all parties required to be served, by on February 2, 2009, sending said copies first-class U.S. Mail to:

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Executed on February 2, 2009.

James E. Pietrangelo, II

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